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82-667

NO

IN THE

Supreme Court of the United States

October Term, 1982

THE STATE OF FLORIDA

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Third District Court of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER THE DECISION OF THE FLORIDA COURT LIMITING THE AUTHORITY OF THE UNITED STATES CONGRESS AND CONSTRUING THE UNITED STATES CONSTITUTION, HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS MAY NOT BOARD A VESSEL IN CUSTOMS WATERS FOR A ROUTINE DOCUMENT EXAMINATION WITHOUT REASONABLE SUSPICION OR PROBABLE CAUSE, IS IN DIRECT DEROGATION OF THIS COURT'S CONSTITUTIONAL ANALYSIS OF SEARCHES IN PROXIMITY TO A BORDER AND IS IN DIRECT CONFLICT WITH THE HIGHEST FEDERAL COURT IN THE SAME JURISDICTION IN UNITED STATES v. ALFREY, 620 F.2d (5th Cir. 1980) HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS NEED NEITHER REASONABLE SUSPICION NOR PROBABLE CAUSE TO BOARD A VESSEL IN CUSTOM'S WATERS FOR A ROUTINE DOCUMENT EXAMINATION.

2. WHETHER THE TRIAL DISTRICT COURT'S FLAT REJECTION OF THE STATE'S CUSTOMS DRUG SMUGGLER PROFILE PRESENTATION REASONABLE SUSPICION ANALYSIS IS IN DIRECT CONFLICT WITH UNITED STATES v. MENDENHALL, 446 U.S. 544 (1980) AND UNITED STATES v. CORTEZ, 449 U.S. 411 (1981) AND IS AN ERRONEOUS CONSTRUCTION OF THE UNITED STATES CONSTITUTION.

3. WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT. SEE, MICHIGAN v. DEFILLIPPO, 443 U.S. 31 (1979), SEE, ALSO, UNITED STATES v. WILLIAMS, 622 F.2d 830, at 840-847 (5th Cir. 1980) (en banc), cert. den., 449 U.S. 1127 (1981).

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida; the Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the Florida trial court. The Respondent, SILVIO P. ZAFRA, was the Respondent in the Supreme Court of Florida; the Appellee in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of pages A1-A30.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District affirming the Florida trial court's granting of the Defendant's Motion to Suppress is reported at State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982). The opinion of the Florida Supreme Court denying the State's Application for review , is contained in the Petitioner's Appendix at "A2" and will be reported by the West Publishing Company. The West Publishing Company citation is the official reporter for citation to these opinions.

II.

JURISDICTION

On July 15, 1982, the Supreme Court of Florida denied the State's timely application for review. A2. On September 13, 1982, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including October 13, 1982. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3); Title 19, United States Code §1581(a); and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979) approved and adopted, Hetland v.

State, 387 So.2d 963 (Fla. 1980). The constitutional issues herein were presented and fully argued at all levels of the proceedings below. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982); A25-A30.

The second issue in the present cause regarding the use of a drug smuggler's "profile" is pending on the merits before this Court in Florida v. Royer, U.S.Sup.Ct. Case No. 80-2146. The issues of the authority of law enforcement officers to conduct routine document and inspections of watercraft in the present case is pending on the merits in Florida v. Casals, U.S.Sup.Ct. Case No. 81-2318, cert. granted October 4, 1982.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States,and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 19 United States Code §1581(a) provides specifically that:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he amy be authorized, within a customs enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within its district, and examine the manifest and other documents and papers and examine, any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

IV.

STATEMENT OF THE CASE

The Defendant, Silvio P. Zafra, was charged by information with three counts consisting of one count of trafficking in marijuana, arising out of his attempt on October 10, 1980 to bring ashore one thousand (1000) pounds of marijuana in a twenty five (25) foot speedboat. The Defendant filed a motion to suppress, which the Florida trial court granted after a hearing.

At the hearing below the State produced three witnesses. The Defendant did not testify and produced no witnesses or evidence. United States Customs Officer Richard Ogden said that he had been trained by the Customs Service to intercept contraband coming into the United States by plane and boat. A10. On October 10, 1980 he went duty at six p.m. and began a

routine survey of boats in the Crandon boat ramp area. A12 .

The customs officers at 3:00 o'clock a.m. encountered the Defendant's boat in customs waters. A25. It was undisputed below that the customs officer thereupon decided to conduct a routine customs boarding. A15. Officer Nassosis checked the boat's papers. A24. Officer Ogden stepped onto the trailer fender and looked into the boat. A15. The deck was much higher than the manufacturer had put in. A15. Ogden said that this was a characteristic profile of smugglers. A16. The trend among smugglers had evolved from throwing contraband into cabins to stowing contraband in hidden compartments. A16. Odgen testified that he observed marijuana residue on the boat carpet. A17. There was also a rise in the carpet evidently covering a hatch area. A17. Odgen testified that he considered this suspicious--

the way the vessel was constructed there should not have been a hatch of that nature under the carpet tacked to the deck. A18. The boat had no fishing gear and only tools and mechanics tools on the deck. A18. Odgen said he pulled the carpet back and an odor of marijuana was coming out. A21. The hatch was secured by screws. A21. In the hatch were twelve (12) bales of marijuana weighing one thousand pounds. A22. The other custom's officers testimony was similar.

Upon the foregoing the prosecutor argued in part that the present custom's boarding was proper under 19 U.S.C. §1581(a) even if neither reasonable suspicion nor probable cause was present. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982); A23. The Florida trial court suppressed the evidence holding that there was no reasonable suspicion or probable cause for the seizure. Id.

On Appeal to the Third District Court of Appeal the District Court affirmed the trial court, holding that customs officers cannot conduct routine customs boarding to check papers without reasonable suspicion or probable cause, to wit:

> "We join the trial court in rejecting the state's position that the apparently unrestricted authority conferred by the terms of 19 U.S.C. §1581(a) is not limited by the reasonableness requirement of the fourth amendment and that a customs officer may therefore make an investigative stop and subsequent search of the vessel in inland waters even though there is neither (a) evidence of a boarder crossing or its functional equivalent, nor (b) prior reasonable suspicion of illegal activity." [Emphasis added; footnotes omitted].

On July 15, 1982, the Florida Supreme Court denied the State's timely Petition for Review. A2. On September 13, 1982 this Honorable Court extended the time for filing the present petition up to and including October 13, 1982.

V

SUMMARY OF ARGUMENT

The present cause presents a constitutional crisis, which only this Court can resolve. The Florida Third District Court of Appeal in Miami, Florida, which is the leading and controlling Florida state court[1] for analysis of federal and state "boat law," see, e.g., Casal v. State, 375 So.2d 1077 (Fla. 3d DCA 1979), affirmed in part, 410 So.2d 152 (Fla. 1982), cert. granted, Florida v. Casal, U.S. Sup.Ct. Case No. 81-2318, opinion filed October 4, 1982; State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982); Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981), has reached a directly

[1]All Florida trial courts are bound by the present decision of the Florida Third District Court. See, State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976). Moreover with the present joint federal and state task force on narcotics traffick centered in Miami and Florida, the impact of the present decision cannot be gainsaid.

contrary result upon the authority of federal officers under a federal statute, than has the highest federal court in the same jurisdiction[2] in United States v. Alfrey, 620 F.2d 551 (5th Cir. 1980) and United States v. Freeman, 579 F.2d 942 (5th Cir. 1979). In sum, the Florida Third District Court of Appeal has told the United States Congress that it cannot do in Florida that which the face of 19 U.S.C. §1581(a) clearly states Congress intended to do: to give customs officers authority in "customs waters" to board vessels for document and customs examination, irrespective of reasonable suspicion or probable cause.

The Florida trial court's rejection and the Florida Third District Court's absolute

[2]All decisions of the United States Fifth Circuit Court of Appeals issued prior to September 30, 1981 are binding upon the present Eleventh Circuit Court of Appeals. Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981)(en banc).

refusal to accept the State's argument upon the aspect of reasonable suspicion as predicated upon a customs profile of drug smugglers and the experience, training and observations of the customs officers, is in direct conflict with the proper constitutional analysis in United States v. Mendenhall, 446 U.S. 544 (1980) and United States v. Cortez, 449 U.S. 411 (1981). The State specially argued below the application of the Carroll doctrine. See, A27- A28; A25-A26. The Florida District Court's erroneous analysis of "profiles;" the experience of law enforcement officers and reasonable suspicion herein is a continuation and extension of the error by the same court presently pending on the merits before this Court in Florida v. Royer, U.S. Sup.Ct. Case No. 80-2146. Additionally on October 4, 1982, this Court accepted jurisdiction in Florida v. Casal, U.S.Sup.Ct. Case No. 81-2318, which

involves state marine patrol officers and their authority under a state statute, together with an application of the Carroll doctrine which are the same issues herein with respect to federal officers under a federal statute.

The present case is therefore a significant case relating directly to pending cases in Casal and Royer, which would serve as a substantial basis for this Court's analysis of an area of critical importance to both the proper analysis of the Criminal law and the security and safety of the citizens of the nation. The matter of the extent of the authority of federal officers under a federal statute as it occurs in the interdiction of drug traffic is of crucial importance to both Florida and the nation. This Court therefore has jurisdiction herein and should exercise it.

Finally the approach, document examination and search herein was conducted by the officers in the good faith belief, that their actions were lawful under 19 U.S.C. §1581(a) and that the observed facts together with their experience and training amounted to reasonable suspicion and probable cause. See, Michigan v. DeFillippo, 443 U. 31 (1979); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981). The harsh result of the exclusionary rule should not therefore be applied to non-egregious conduct.

VI

ARGUMENT

The State stipulated below that this was not a customs "border" search under 19 U.S.C. §1582, but was a customs search under the companion section, 19 U.S.C. §1581(a). A border search by customs under 19 U.S.C. §1582 traditionally requires some degree of proof by the prosecution that the vessel, vehicle, aircraft or person has crossed a border. See, e.g., United States v. Ivey, 546 F.2d 139 (5th Cir. 1977), cert. den. 431 U.S. 943, 97 S.Ct. 2662, 53 L.Ed.2d 263 (1977)(mere nexus); United States v. Adams, 569 F.2d 924 (5th Cir. 1978)(mere proof of nexus to border is sufficient). The prosecutor herein for whatever reason, did not argue that the matter was a border search. But see, United States v. Ivey; United States v. Adams, supra.

Through the enactment of 19 U.S.C. §1581(a) Congress has also authorized customs officers to stop and search vessels in customs waters, to stem the importation of contraband or undeclared merchandise to wit:

> "Any officer of the customs may at any time go on board any vessel or vehicle at any place in the United States or within the customs waters. . .and exmine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

See, United States v. Williams, 617 F.2d 1063 (5th Cir. 1980)(en banc). Concurrent with 19 U.S.C. §1581(a) Congress has also provided customs officers with authority to stem the importation of narcotics, in 21 U.S.C. §955, which provides that it is:

> "unlawful for any person to bring or possess on board any vessel. . .arriving in or departing from the United States or the customs territory of the United States, a controlled substance. . ." [Emphasis added].

See, United States v. Espinosa-Cerpa, 630 F.2d 328, at 334 (5th Cir. 1980). These statutes have been broadly construed with respect to the statutory powers of customs officials. See, United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. den. 393 U.S. 1121, (1969). The Supreme Court has only limited the historical right of the sovereign to control its borders to proximity to the border. Warrantless searches in customs territory are deemed reasonable within the meaning of the Fourth Amendment by virtue of the fact that they occur at the border. See, United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981); United States v. Freeman, 579 F.2d 942 (5th Cir. 1978); approved

in, United States v. Williams, 617 F.3d 1063, at 1081 (5th Cir. 1980)(en banc); see also, United States v. Ramsey, 431 U.S. 606 (1977); Carroll v. United States, 267 U.S. 132 (1925); First Congress Act of July 31, 1789, Ch.5, 1 Stat. 29 (1789). As the Third District Court conceded, the authority of customs officers under 19 U.S.C. §1581(a) in customs waters in indeed, plainly on the face of the statute not limited by traditional Fourth Amendment analysis. See, A5.

In the case at bar, and for all purposes, "customs waters" are defined in 19 U.S.C. 1401(j) as, "the waters within four leagues [12 nautical miles] of the coast of the United States." Within such a definition for purposes of international law, the area from the coast to three (3) nautical miles is also known as "territorial sea" and the area from three (3) nautical miles to twelve (12) nautical miles is

also known as the "contiguous zone." See, United States v. Williams, 617 F.2d at 1073, n.6.

In the case at bar, it is undisputed that the vessel, which was searched was encountered by the Customs officer's herein in customs waters. A14; A25 (prosecutor argument). Under 19 U.S.C. §1581(a) the customs officers herein were not required to have either reasonable suspicion nor probable cause for a detention or search. See, United States v. Alfrey, 620 F.2d 551 (5th Cir. 1980); United States v. Freeman, 579 F.2d 942 (5th Cir. 1979), approved, United States v. Williams, 617 F.2d 1063 at 1081 (5th Cir. 1980)(en banc). In Alfrey, supra, the court held specifically that:

> [T]he recent decision of this Court in United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), rehearing en banc denied, 601 F.2d 586, cert. denied, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320, clearly holds that

> United States Customs Officers have authority under 19 U.S.C. §1581(a) to stop and board vessels initially cited in customs waters for document check even in the absence of a modicum of suspicion or probable cause. See also United States v. Freeman, 579 F.2d 942, 945 (5th Cir. 1978). This intepretation of section 1581(a) does not offend the Fourth Amendment. Whitaker, supra, 591 F.2d at 829; Freeman, supra, 579 F.2d at 946." [Emphasis added].

Similarly in Freeman, the customs officers encountered, a sailboat within the three mile limit with no indication whatsoever that it had crossed any border. The Freeman Court noted that there was no warrant, no probable cause for a warrant and no reasonable suspicion to stop the vessel, 579 F.2d at 945. However, the court upheld the warrantless search of the vessel pursuant to the express language in 19 U.S.C. §1581(a) explaining that:

> "[T]he authority embodied within §1581 may be traced back to the commencement of the Republic when the First Congress statutorily granted Customs officials broad powers. The historical significance of the enactment of such Customs statutes by the same Congress which proposed the Fourth Amendment has been recognized by the Supreme Court. Clearly, members of the First Congress regarded neither seizures nor searches of the kind authorized by §1581 'unreasonable' or embraced by the prohibition of the Fourth Amendment." [Emphasis added].

Id. at 946-947.

Both Alfrey and Freeman are binding law for the present federal jurisdiction. See, Bonner v. Pritchard, supra, at n.2.

In the case at bar, it was undisputed that after observing the circumstances, the Customs officers decided to conduct a routine boarding (A15) and that Officer Nasossis checked the vessel's papers (A24). Under the express

authority of §1581 and the foregoing federal substantive law, the initial detention and search herein was without constitutional defect. The District Court's holding that under 19 U.S.C. §1581(a) that the federal officers must show reasonableness under the Fourth Amendment cannot be reconciled and is in direct conflict with the interpretation of the United States Constitution in United States v. Alfrey and United States v. Freeman, supra. The present conflict presents a grave constitutional crisis between the highest federal appellate court having jurisdiction in Florida and the Florida Third District Court of Appeal which is the leading court for the interpretation of 19 U.S.C. §1581(a) and "boat law" in Florida. See, Florida v. Casals; State v. Doyle; Morales v. State, supra. Furthermore all Florida trial courts are bound by the present decisions. State v. Hayes, supra, at n1.

Furthermore, the State would note that the federal officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, __ U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)(approving use of profile characterisics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973)(approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various

> objective observations, information form police reports, if such are aailable, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained perrson." [Emphasis added]. 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132 (1925); See also, Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970).

The Florida District Court's and the trial court's flat rejection of the States argument

upon articulable suspicion which was based upon the customs "profile" and the observations, training and experience of the officers, is patently erroneous in the face of the correct constitutional analysis in Mendenhall and Cortez. The fact that the events transpired in the proximity of a border is additionally a fact, which the Florida courts erroneously absolutely refused to credit. See, Cortez. The Florida District Court's erroneous analysis of "profiles" reasonable suspicion and "boat" law is a direct continuation and extension of the same erroneous analysis presently on review upon the merits in Florida v. Royer, U.S. Sup.Ct. Case No. 80-2146 and Florida v. Casal, U.S. Sup.Ct. Case No. 81-2318, cert. granted, October 4, 1982. Casal involves a state statute authorizing document and safety checks by state marine officers and the application of

the Carroll doctrine to that event. The present cause involves precisely the same authority and the Carroll doctrine in the context of a special federal statute and federal officers. This Court has never written a definitive "boat" case opinion or explained the parameters of 19 U.S.C. §1581(a). The State submits that the extraordinary federal and state interest in resolving these issues is cogently and timely presented by the present cause and Casal. Florida with the presense of a massive federal and state joint task force on narcotics traffick; the greatest coast line and the most geographic vulnerability to drug traffic, is the ideal situs for consideration of these issues. Certainly, the nation's stake in Florida as a recognized corridor of drug traffic is paramount. See, SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, 95th CONG. 2D SESS., REPORT ON PROBLEMS OF LAW ENFORCEMENT

AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA. (Comm. Print 1978). This Court should also exercise its jurisdiction herein in the context of Florida v. Royer, and the Florida Third District's absolute rejection of any "profile" analysis and refusal to credit the experience and training of federal and state officers and the proximity of the present transaction to the nation's border, in its analysis. The issue of the profile and reasonable suspicion for these highly trained officers was raised at all levels below. See, A25-A30.

Finally, the State submits that the cause herein is in direct contravention to the good faith analysis of this Court in Michigan v. DeFillippo, 443 U.S. 31 (1979) where despite the unconstitutional nature of the statute this Court nevertheless sustained the seizure where the officers were relying in good faith upon

the statute and its validity. The relationship of DeFillippo to the present circumstance is direct. The federal officers herein were relying upon 19 U.S.C. §1581(a) and that, which even the Florida District Court admits that the statute plainly says the officers can do: board any vessel in customs waters for document and customs inspection. For Florida and all federal customs officers in state court, the present ruling squarely conflicts with Michigan v. DeFillippo. Moreover, the officer's good faith reliance upon their observations, training and experience to conclude that a detention was necessary, presents a circumstance herein of plainly non-egregious police conduct, to which the harsh penalty of the exclusionary rule should find no application. See, California v. Minjares, 443 U.S. 916 (1981)(Rehnquist, J. and Burger, J., dissenting); Stone v. Powell, 428 U.S. 465, at

496-502 (1976)(Burger, J., concurring); Id, at 537-542 (White, J., dissenting); Brewer v. Williams, 430 U.S. 419, at 420-429 (1977)(Burger, J. dissenting; Brown v. Illinois, 422 U.S. 590, at 610-612 (Powell, J. concurring); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981).

VII

CONCLUSION

The Florida Third District Court of Appeal's holding that under 19 U.S.C. §1581(a) that the State must show reasonableness under the Fourth Amendment cannot be reconciled and is in direct conflict with the proper interpretation of the United States Constitution and §1581(a) in, United States v. Alfrey, and United States v. Freeman, supra. At the same time, the decision of the Florida Third District Court is binding on all Florida trial courts and emanates from the leading Florida state court in the construction and analysis of "boat" law and drug courier case law. The present matter is plainly governed by the federal law and the federal interest in maintaining the integrity of the borders and "customs waters" of the United States. This Court should take jurisdiction of the present matter. Florida

has the greatest coastline of any state and a grave interest in the consistent interpretation of "boat law." The inconsistent and erroneous analysis of the Florida District Court presents a conflict on a matter of substantial public and national importance, warranting the exercise of this Court's jurisdiction. The present decision's direct effect upon a national federal and state effort in Florida to stem the tide of drug traffic manifestly supports the propriety of the exercise of this Court's jurisdiction. The present cause presents a most cogent and timely companion Case on the question of federal officer's authority under federal statutes together with the issue of a state officer's authority and the Carroll doctrine in Florida v. Casal, cert. granted, October 4, 1982. Finally, the extraordinary penalty of the exclusionary rule should not be applied, to the federal officer's

good faith reliance upon the plain language of the statute and where their actions are non-egregious.

RESPECTFULLY SUBMITTED on this ____ day of October, 1982, at Tallahassee, Leon County, Florida.

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APPENDIX

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SUPREME COURT OF FLORIDA
THURSDAY, JULY 15, 1982

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 61,844
District Court of
Appeal 3d District

SILVIO P. ZAFRA, : Case No. 81-474

Respondent. :

This cause having herefore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Consittution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330 (d).

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, and McDONALD, JJ., Concur

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. James R. Jorgenson, Judge
Hon. Richard P. Brinker, Clerk

Calvin L. Fox, Esquire
Paul Morris, Esquire
William A. Clay, Esquire

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1982

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee.	**	

Opinion filed January 12, 1982.

An Appeal from the Circuit Court for Dade County, James R. Jorgenson, Judge.

Jim Smith, Attorney General, for appellant.

Paul Morris; Rosen,Portela, Bronis, Angueira & Clay and William A. Clay, for appellee.

Before HUBBART, C.J. and BARKDULL AND SCHWARTZ, JJ.

Schwartz, Judge. A5

We join the trial court in rejecting the state's position that the apparently unrestricted authority conferred by the terms of 19 U.S.C. §1581 (a) [1] is not limited by the reasonableness requirement of the fourth amendment and that a customs officer may therefore make an investigation

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1. §1581. Boarding vessels

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enformecemt area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

stop and subsequent search of a vessel in inland waters [2] even though there is neither (a) evidence of a border crossing or its functional equivalent, [3] nor (b) prior reasonable suspicion of illegal activity. It is clear that this contention is incorrect and that, under the stated circumstances, such activity is not constitutionally permissible. United States v. Villamonte-Marquez, 652 F.2d 481, 484 (5th Cir. 1981); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. D'Antignac, 628 F.2d 428, 432-33 (5th Cir. 1980), cert. denied,

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2. Compare United States v. Freeman, 579 2d 942 (5th Cir. 1978) (stop and boarding on open waters for document check; subsequent search based on probable cause discovered thereafter); Morales v. State, ____ So.2d____(Fla. 3d DCA Case nos. 80-248, 80-249, opinion filed, December 15, 1981).

3. Compare United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981); State v. Smith, 399 So.2d 22 (Fla. 3d DCA 1981).

____U.S.____, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981); Morales v. State, ____So.2d _____(Fla. 3d DCA Case nos. 80-248, 80-249, opinion filed, December 15, 1981) (dictum); Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974); see, United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). In the posture in which the case was presented and decided below, we need and do go no further in determining the outcome of this appeal.

Affirmed.

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA
CRIMINAL DIVISION

THE STATE OF FLORIDA)
Plaintiff,)
vs.) No. 80-19386
SILVIO ZAFRA,)
Defendant.)
- - - - - - - - - - - -X

Metropolitian Justice
Building,
Miami, Florida,
Friday, 9:00 a.m.,
February 20, 1981.

— — —

The above-entitled case came on for motions before The Honorable James R. Jorgenson, Circuit Judge, pursuant to Notice.

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APPEARANCES:

JANET RENO, State Attorney, by
ELYSE TARG, Assistant State Attorney,
Attorney for Plaintiff.

ROSEN, PORTELA, BRONIS, ANGUEIRA, &
CLAY, by WILLIAM A. CLAY, Esq. of
counsel.
Attorneys for Defendant.

[EXCERPT OF TESTIMONY]

RICHARD D. OGDEN was called as a witness and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Would you please state your name and official capacity for the record.

A Richard D. Ogden. I am a patrol officer for the United States Customs Service.

Q How long have you been so employed as a Customs Patrol Officer?

A For approximately eighteen months.

Q Pursuant to that job, did you have any training?

A Yes, ma'am, I did.

Q What training was that?

A I attended a seven week integrated law enforcement course of the

Federal Enforcement Center in Glencoe, Georgia. In addition, I attended a four and a half week course at the same location, which dealt with specific duties assigned to Customs Patrol Officers.

Q Officer, what are the duties of a Customs Patrol Officer--and, for the record, I will use a CPO.

What are the duties of a CPO?

A To intercept the flow of contraband coming into the United States, primarily narcotics, and to enforce other customs and related laws.

Q Are your powers basically dealing with boats, airplanes or what?

A Yes, ma'am.

A high percentage of our work deals with boats and aircraft coming into the country.

Q Were you employed on August 10, 1980?

A Yes, ma'am.

Q Were you employed as a CPO then?

A Yes, ma'am.

Q Did you come on to duty that day?

A I came--reported for duty at 6:00 p.m. on October 9.

Q What were you going to do that night?

A Generally that night we conducted a routine servey--myself and my partners --of the public boat ramps situated in the local Miami area going from Key Biscayne up to Bakers Haulover and making an analysis on the different types of trucks and boat trailers parked at these locations.

Q How many boat ramps did you investigate that night, approximately?

A Approximately eight.

Q At any of these ramps did you notice anything unusual or was anything brought to your attention?

A Yes, ma'am.

Q What was that?

A At Crandon Boat Ramp, I would estimate at approximately eight to nine p.m. that evening, we observed two pick-up trucks with trailers attached which attracted our attention.

Q Why did they attract your attention?

A Based on my prior experience as well as the documented experience of all the other officers in our office, this particular trailer, which was a three axle float on, fit somewhat of a profile commonly used in smuggling activities.

Q Why did this seem suspicious? What was it about this type of trailer which seemed suspicious?

A That this particular type of trailer has the capability of carrying a very large vessel as opposed to what

would be used just for fishing around the bay.

* * *

Q Opportunity when was the next time you saw somebody approach that trailer?

A The first and only time we saw someone approach that trailer was when one of two persons boarded the 25 foot Bertram, which arrived at Crandon Marina.

Q What time was that, approximately?

A I believe that was a little after three o'clock in the morning.

Q Was that on October 10?

A Yes, ma'am.

Q Was the length of time between which you had first seen it and the fact that it was three o'clock--did that affect you in any way?

[Objection overruled].

A Yes, ma'am.

Q How so?

A From the time we first spotted the truck and trailer until the time someone approached it, it was nearly seven hours.

That, to me, aroused my suspicions in that it would have been an unusually long fishing trip, in my opinion.

Q Would it have any other influence on you, as to the length of time?

A Yes, ma'am.

We have made notes in our office and calculated on several occasions that it generally takes vessels approximately four and a half to five hours to go from here to any of the islands in the Bimini area and to return. This affected my thinking in that they had more than sufficient time to go to any of the islands, which could be used as a stash site--and there are intelligence bulletins that we have with indicate that that is a common method--store the marijuana on a vessel and return.

Q Did you have occasion to see anybody on the boat?

A Yes, ma'am.

Q Who was that?

A The defendant, Mr. Silvio Zafra, and one other individual.

* * *

Q Officer Ogden, was there anything else about the appearance of these two Latin males which you found to be suspicious?

A Yes ma'am.

Q What was that?

A On the initial glance at the two individuals they appeared to be somewhat--excuse the term--weatherbeaten. They looked like they had been out for some time engaging in perhaps heavy work or something.

Their clothes were somewhat dirty. They just looked like they had really been worked over.

Q Did there come a time when you stopped the two individuals?

A Yes, ma'am.

Q When was that?

A A few minutes after we first stopped the boat coming up to the dock.

Q What was the purpose of the stop?

A. The purpose of the stop was to conduct a routine Customs boarding.

Q Pursuant to that, what did you do?

A My two partners went up to talk to the individuals and to obtain the necessary registration forms. I went to the vessel, which was already aboard the three axle float-on trailer and had already been pulled out of the water. I stepped on the fender above the wheels of the trailer and looked over the gunwale of the vessel into the boat.

Q At that time did you notice anything unusual about that boat?

A Yes, ma'am.

Q What was that?

A I noticed that the main deck of the vessel was considerably higher than what I would believe the manufacturer would have put it. This is also a

profile which has become quite common among smugglers.

The trends have changed over the years. They have gone from just throwing it into the cabin and loading it in remote spots along the coast to using secret compartments and bringing it on to the public boat ramps.

Q Have you ever encountered boats like this in your experience?

A Yes.

Q Have you encountered contraband in these boats?

A Yes, ma'am.

Q How many seizures have you made in boats of this type?

A I would approximately maybe fifteen.

Q What did you do next?

A I climbed aboard the vessel, took a quick glance into the cabin area to assure myself that there was no other

persons on board the cabin, and it was more or less a visual--just a quick visual check.

I looked down at the deck and got down on my hands and knees where I could get a closer look at it.

I had one flashlight and I did observe marijuana residue embedded in the carpet.

You could not see it until you got down on your hands and knees and looked really close and spread the pieces of carpet, you know, apart.

Q Did you find anything else?

A Yes, ma'am.

Prior to finding the residue, I did run my hand over the carpet itself in an effort to determine if I could feel anything underneath and I did feel what appeared to be a small rise underneath the carpet.

Due to its shape and size it led me to believe that there was a hatch underneath the carpet.

Q This was covered by the carpet though?

A That is correct.

Q In your experience, was that suspicious?

A Yes, ma'am, it was.

Q Why?

A Because, the way the vessel was constructed, there shouldn't have been a hatch of that nature under carpet tacked down to the deck.

Q Was there anything else about what you saw on the deck of that boat which made you suspicious?

A Yes, ma'am. There were several tools and a lot of odds and ends on the deck that really had nothing to do with any fishing expedition, as far as I could tell--the tool boxes, odds and ends, mechanics' tools and things that I, ordinarily, would not expect to see on a boat, especially for a fishing expedition.

To the best of my recollection, there was no fishing gear on board the boat. I believe there might have been an ice chest, but I didn't see any fish nor did I see any bait.

Certainly anyone engaging in a fishing trip for six or seven hours would, in my opinion, at least come back with something.

Q What led you to believe that these people might have been on a fishing trip?

You said that anyone on a fishing trip would have had something there.

What led you to believe that they might have been on a fishing trip?

A. Generally--it was just an assumption on my part at that point that they were.

Generally, when we stop boats and ask the routine questions, they generally are fishing or they're taking the boat out

for a test run to test it out.

Q In your experience, when you find this residue on the ground what do you usually find?

A Usually when we find residue, in my experience, we'll either find a stash of marijuana on the vessel or we'll find a secret compartment which has other residue in it which is an indication that perhaps at one time or another it did carry marijuana.

Q What did you do after you had gotten down on your hands and knees?

A After I had gotten on my hands and knees and picked up a little residue and saw the incongruency in the deck below the carpet, I asked my partner, Richard Nasossis, to come aboard the vessel and give me a hand.

Q Did he?

A Yes, ma'am, he did.

Q What happend then?

A I told him what I had found and he agreed that there was definitely something amiss.

We pulled back the carpet off the deck, which was--it was just lightly tacked down with a little adhesive, and he put his nose---

We did dind a hatch. It was basically rectangular in shape and secured by probably a dozen or more screws.

He got down on his hands and knees and put his nose to one of the seams in the hatch and took a whiff and came up and said yeah--he could smell what he thought was marijuana.

Q What did you do then?

A We proceeded to remove the screws from the hatch and lifted the hatch and the marijuana was visible--immediately visible--below the deck.

Q Have you seen marijuana before?

A Yes, ma'am.

Q To your trained eyes, this was marijuana?

A Yes, ma'am.

Q Did you run any test on it?

A Yes, ma'am, we did run a field test.

Q What did you do?

A We have a small test tube filled with a chemical agent whch, when exposed to THC, which is in marijuana and hashish, will turn bright red.

We removed a few leaves. I tore open one of the bales and removed a few leaves and a couple of seeds, put them in the tube, mixed it with the chemical , shook it up, and it tested positive and turned bright red.

Q How much marijuana was there?

A We found twelve bales and we estimated the weight to be approximately 1000 pounds.

These were somewhat large bales.

Q Did all of this take place in Dade County, Florida?

A Yes, ma'am.

[EXCERPT: CUSTOMS OFFICER CARLIN]

Q What did you do?

A As we approached in the vehicle, Officer Butchko, who was the Dade County man there, was sort of--I think he was getting ready to leave, and we identified ourselves as Custom Officers to him and we approached the vessel.

We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed on it, and on the back it says, "U.S. Customs" I think in two inch lettering. It has a Customs patch on each sleeve.

So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.

Q What happened next?

A I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted.

At that time I returned to our vehicle to begin filling out a search and boarding form, which we routinely do in most cases involving Custom seizures.

MS. TARG: I have no further questions of this witness, Your Honor.

[EXCERPT: ARGUMENT OF PROSECUTOR]
[1. Customs Search]
MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding on vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding the boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

* * *

[2. Articulable Suspicion]
The Court cases have held that, in deciding whether there is reasonable suspicion, a Customs Patrol Officer is entitled

to assess the facts in the light of their experience, and you must look at the totality of the circumstances.

We would, for those reasons, argue that the test to be given is: Did these CPO's, in their experience in the Customs Service, have articulable facts together with rational inferences from these facts to engender a reasonable suspicion that the vessel in this case was being used for narcotics trafficking and, again, we rely on those cases and on U.S. versus Brignoni-Ponce, a Supreme Court case cites at 95 Supreme Court 2574.

[EXCERPT OF STATES BRIEF ON APPEAL TO FLORIDA 3d DCA]

B. Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (approving use of profile characteristics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973) (approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment

> must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions --inferences and deductions that might well elude an untrained person." Emphasis added . 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck . [Citations Omitted] . When the officers so clearly had probable cause to search the hold, the warantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132, 54 S.Ct. 280, 69 L.Ed. 543 (1925), adopted by statute in Florida Statute §933.19. See also, Texas v. White, 423 U.S. 67, 96 S.Ct. 304,

46 L.Ed.2d 209 (1975); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419 (1970); State v. Lopez, 369 So.2d 623 (Fla. 2d DCA 1979). In Chambers v. Maroney, the Court explained the exigency requirement thus:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant (sic) is obtained; arguably, only the 'lesser' instrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment". [Emphasis added] 399 U.S. at p. 51-52.

Undoubtedly the exigency exception to the warrant requirement was manifest in the case at bar. The trial court's suppression

of the evidence is therefore erroneous even under traditional search and seizure analysis and must be reversed.